

No. 48526-5-II

Court of Appeals, Div. II,  
of the State of Washington

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**State of Washington,**

Respondent,

**v.**

**Brian Christopher Cozad,**

Appellant.

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Reply Brief of Appellant

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## 1. Introduction

The pressure of circumstances required Cozad to make a choice between violating sex offender registration requirements or losing his job and becoming permanently homeless, thereby becoming a greater danger to the general public. The trial court erred in refusing to instruct the jury on the necessity defense, excluding evidence relevant to the defense, and in instructing the jury on alternative means that were not supported by evidence.

The State's response brief presents arguments that are unsupported by the evidence in the record and suffer from circular reasoning and other logical flaws. Cozad presented sufficient evidence to support his defenses and arguments on appeal. The State failed to present contrary evidence. This Court should reverse the conviction and remand for a new trial.

## 2. Argument

### 2.1 The trial court erred when it instructed the jury regarding registration requirements that apply only to offenders with a "fixed residence."

Cozad's Brief of Appellant argued that the undisputed evidence at trial established that Cozad lacked a fixed residence as a matter of law. Br. of App. at 7-11. Cozad could not lawfully reside at the apartment because he was not on the lease and he

had been asked by the apartment manager to vacate the premises. Because the apartment was a location where Cozad did not have permission to stay, Cozad “lack[ed] a fixed residence” under the statutory definition. Cozad argued that it was reversible error for the trial court to instruct the jury on registration requirements that did not apply to him.

**2.1.1 The amendment to instruction 13 added alternative means for which there was no evidence.**

The State argues that there was no error because “failure to register is not an alternative means crime,” relying on *State v. Peterson*, 168 Wn.2d 763, 771, 230 P.3d 588 (2010). However, as this Court has recognized, *Peterson* must be restricted to its own facts. *State v. Mason*, 170 Wn. App. 375, 381–82, 285 P.3d 154 (2012) (“We caution, however, that applying our Supreme Court’s reasoning in *Peterson* that focused solely on *Peterson*’s narrow factual circumstances to other factual circumstances leads to results contrary to the statutory language.”).

The facts of *Peterson* are not present in this case. In *Peterson*, the defendant had moved out of his apartment and failed to register at all for over 30 days. *Peterson*, 168 Wn.2d at 766. The registration statute sets forth various time limits for reregistration, depending on the offender’s residential status, the longest being ten days. *Id.* at 768. *Peterson* argued that each different residential status and corresponding deadline created

an alternative means of committing the crime. *Id.* at 769-70. The court held that these were not alternative means because they all involved the same conduct: “moving without registering.” *Id.* at 770.

Here, the State pursued its case based on Cozad’s failure to report to the sheriff in person each week. *E.g.*, RP 6 (“We will only be proceeding on the transient violation. We will not be proceeding under the fail to notify of change of residence prong.”). Failure to report weekly in person under RCW 9A.44.130(6)(b) is not the same conduct as failure to register as transient after ceasing to have a fixed residence under RCW 9A.44.130(6)(a). It is not the same conduct as “moving without registering” under *Peterson* (the conduct added to jury instruction 13 as subsection (4)). It is not the same conduct as providing false registration information (the conduct added to jury instruction 13 as subsection (3)).

These alternatives are not merely “definitions” as argued by the State; they describe different, alternative means by which a person could commit the crime of failure to register: by failing to report in person; by failing to register as transient after losing a fixed residence; or by providing false registration information.

**2.1.1.1 There was no evidence to support subsection (4) because Cozad registered after he moved.**

There is no evidence that Cozad failed to register as a transient after ceasing to have a fixed residence. In fact, it is undisputed that Cozad **did register as a transient**. By the same token, Cozad did not “mov[e] without registering.” The trial court erred in adding subsection (4) to instruction 13.

**2.1.1.2 There was no evidence to support subsection (3) because Cozad correctly registered as transient when he lacked a fixed residence.**

There is also no evidence that Cozad provided false registration information when he registered as transient. As Cozad argued in his opening brief, he “lack[ed] a fixed residence” under the statutory definition because he did not have permission to live at the apartment.

The State argues that Cozad’s use of the apartment was lawful because he had his girlfriend’s permission to enter. The State relies on *City of Bremerton v. Widell*, 146 Wn.2d 561, 570, 51 P.3d 733 (2002), for the proposition that a landlord may not prevent an invitee of a tenant from entering the tenant’s premises. However, *Widell* also acknowledges the common principle that tenants may have their right to invite guests restricted by the terms of their lease. *Id.* at 572 n. 2; *see also* RCW 59.18.140 (Residential Landlord-Tenant Act requires a



tenant to conform to all reasonable restrictions on occupation of the dwelling unit).

The State presented no evidence that Cozad actually had a right to reside at the apartment or that Cozad's girlfriend had legal authority to grant that license. The only evidence is that Cozad was not on the lease (RP 143); that the apartment manager asked Cozad to leave the premises (RP 143); and that Cozad subsequently returned to the apartment secretly to avoid detection (RP 147-48). None of this evidence points toward Cozad having a lawful license to use the apartment as a fixed residence under the statutory definition.

The State has the burden of proof. The State failed to present any evidence that the apartment was a fixed residence after Cozad had been asked to leave the premises. Cozad cannot be convicted on this alternate means of failure to register by providing false information, where there is no evidence that his registration as transient was false. Cozad lacked a fixed residence. The trial court erred in adding subsection (3) to instruction 13.

The trial court erroneously amended instruction 13 to add alternative means for which there was no evidence.

**2.1.2 The amendment to instruction 13 was manifest constitutional error.**

The trial court's error in amending instruction 13 to include alternative means that were not supported by evidence is an error of constitutional magnitude under rights of due process; therefore it can be raised for the first time on appeal. RAP 2.5(a). "[I]n order to safeguard the defendant's constitutional right to a unanimous verdict as to the alleged crime, substantial evidence of each of the relied-on alternative means must be presented." *Peterson*, 168 Wn.2d at 769 (quoting *State v. Smith*, 159 Wn.2d 778, 784, 154 P.3d 873 (2007)). The State does not address Cozad's constitutional argument.

Instruction 13, as amended, includes alternative means for which there was no evidence. This error is not harmless. A reasonable jury, properly instructed, might have acquitted Cozad on his affirmative defense of necessity.

**2.1.3 Cozad's trial counsel was ineffective in failing to object to the amended instruction.**

Cozad argued, alternatively, that this Court should review the error because Cozad's trial counsel was ineffective in failing to object to the amended instruction. The State argues only that counsel was not ineffective because the instruction was not objectionable. As noted above, the amended instruction added alternative means that were not supported by evidence. The

instruction was erroneous, and trial counsel should have recognized the error and objected. *See* Br. of App. at 12-14. This Court should review the error, reverse, and remand for a new trial.

2.2 The trial court erred when it refused to instruct the jury on the defense of necessity.

Cozad argued that the trial court should have instructed the jury on the defense of necessity and admitted evidence Cozad had offered to support the defense. Br. of App. at 14-20. The common law necessity defense is available when natural physical forces or the pressure of events cause the defendant to act unlawfully in order to avoid a harm social policy deems more serious than the harm resulting from a violation of the law. *State v. Diana*, 24 Wn. App. 908, 913-14, 604 P.2d 1312 (1979). The State argues that Cozad failed to establish the elements of the defense.

**2.2.1 Cozad reasonably believed that violating the law was necessary to avoid or minimize a harm.**

The State argues that Cozad did not testify that he believed committing the crime of failure to register was necessary to avoid or minimize a harm. Cozad does not have to testify to be entitled to a necessity defense, so long as other evidence supports the defense. Cozad's opening brief set forth evidence from which a reasonable jury could conclude that

Cozad reasonably believed that violating the in-person reporting requirement was necessary to avoid losing his job, income, and prospects for permanent residence. Br. of App. at 16-17. Cozad was employed at a remote worksite for Georgia Pacific. RP 144. He was picked up each morning at Labor Works and dropped off at night after his shift. *See Id.* He could not leave the worksite during the sheriff's office's business hours without losing his job. *See* RP 148-49. Cozad's income was helping to pay his girlfriend's rent. RP 148. In order to avoid the harm to society of Cozad becoming a truly and permanently homeless sex offender, it was necessary for him to work. The sheriff's office's schedule for weekly check-in made it impossible for Cozad to do both.

**2.2.2 The harm to be avoided was greater than the harm resulting from violating the law.**

The State argues that the potential harm to society from a sex offender failing to check in is great, but the harm of Cozad losing his job affects only Cozad. This argument is contrary to the evidence.

The purpose of the registration requirements is to assist law enforcement investigation and to counteract the danger created by the particular offender. *N.L. v. Bethel School District*, \_\_\_ Wn.2d \_\_\_, No. 91775-2, slip op. at 19 (Sept. 1, 2016). Registration and in-person check-in accomplishes this purpose by providing law enforcement with information about the

whereabouts of each offender. At most, Cozad's failure to check-in during business hours on a Tuesday meant that the sheriff's office did not receive this information until the next morning when the office received the detailed voice message Cozad left each Tuesday night. *See* RP 106 (messages received by sheriff's office), 146 (left detailed messages), 148 (told sheriff's office where he was staying each night). This delay of only a few hours does not create any great harm to society.

On the flip side, had Cozad instead chosen to report in-person, he reasonably believed that he would have lost his job and any prospect of a fixed residence. The harm would extend beyond just Cozad himself. As the sex offender registration statute recognizes, a homeless sex offender poses a higher risk to the public than one with a fixed residence. *See* RCW 9A.44.130(6)(b). Cozad would have become a greater danger to society if he had complied with the statute and lost his job as a result. This harm was greater than the harm of a few hours' delay in reporting his whereabouts to the sheriff's office.

### **2.2.3 The threatened harm was not brought about by Cozad.**

The State argues that Cozad brought the situation upon himself by committing sex offenses in the first place and then falsely registering as transient. This is not only untrue, but illogical. As shown above and in Cozad's opening brief, Cozad

lacked a fixed residence under the statutory definition from the time the apartment manager asked him to leave the premises. There is no evidence that Cozad had a lawful license to reside in the apartment after that time. The argument that a sex offender should lose the necessity defense to a failure to register charge solely because they are a sex offender is circular and would create an absurd result.

Cozad did not bring the circumstances upon himself. It is difficult to obtain work as a felon. RP 149. Cozad had to take the opportunities that presented themselves if he was to be able to earn an income and obtain stable housing. The necessity arose because the statute and the practice of the sheriff's office required weekly, in-person check-in only on a day and at times when Cozad was unavailable if he wanted to keep his job. The necessity was not of Cozad's making.

Cozad also did not bring about the threatened harm that he had sought to avoid (becoming unemployed and homeless and therefore a greater danger to society). In other words, he succeeded in avoiding the greater harm by choosing instead to violate the statute.

#### **2.2.4 No reasonable legal alternative existed.**

The State argues that Cozad had a legal alternative by requesting time off from work or checking in during a lunch

break. There is no evidence to support this argument. The only evidence is that Cozad worked at a remote worksite with strict rules, where he could not so much as borrow a phone to make a phone call during work hours. *E.g.*, RP 148-49. Even assuming Cozad received break time that would comply with FLSA, there is no evidence that he would have been able to make it to the sheriff's office, check-in, and return to work on time. The only evidence in the record supports Cozad's argument that he had no legal alternative. He could not both refuse to do the criminal act and also avoid the threatened harm. *See State v. Kurtz*, 178 Wn.2d 466, 478, 309 P.3d 472 (2013).

Cozad presented evidence supporting all of the elements of the necessity defense. He was entitled to have the jury instructed on the defense. The trial court committed reversible error in refusing to give the instruction.

#### **2.2.5 The trial court abused its discretion in excluding evidence relevant to the necessity defense.**

The trial court also abused its discretion in excluding, as irrelevant, evidence that was relevant to the necessity defense. *See* Br. of App. at 19-20. The State incorrectly argues that the evidence was only relevant to an argument of substantial compliance, which is not permitted. The proffered evidence was relevant to the necessity defense.

As shown above and in Cozad's opening brief, evidence of Cozad's Tuesday night phone messages and receipt of those messages by the sheriff's office was relevant to the balancing of the harms that is necessary to the necessity defense. The fact that the sheriff's office received the required information about Cozad's whereabouts shows the minimal harm of Cozad's violation in comparison to the greater harm to society from Cozad becoming unemployed and permanently homeless.

Similarly, evidence of the sheriff's office's inflexibility with regard to check-in times and methods was relevant to show that the pressing circumstances were not brought about by Cozad and that Cozad did not have any reasonable legal alternatives.

The trial court abused its discretion in excluding evidence relevant to the necessity defense, and then subsequently refusing to instruct the jury on the defense, citing a lack of evidence. *See* RP 169. There was, in fact, sufficient evidence to support the elements of the necessity defense. Cozad was entitled to have the jury instructed on the defense. The trial court's refusal to give the instruction was reversible error. This Court should reverse and remand for a new trial.

### 3. Conclusion

The trial court erred in amending jury instruction 13 to include alternative means that were not supported by evidence.



The trial court also erred by refusing to instruct the jury on the necessity defense when the defense was supported by substantial evidence. To the extent the trial court excluded evidence relevant to the defense, it abused its discretion. This Court should reverse and remand for a new trial.

Respectfully submitted this 26<sup>th</sup> day of September, 2016.

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## CERTIFICATE OF SERVICE

I certify, under penalty of perjury under the laws of the State of Washington, that on September 26, 2016, I caused the foregoing document to be filed and served by the method indicated below, and addressed to each of the following:

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Rachel R. Probstfeld Clark County Prosecuting Attorney P. O., Box 5000 Vancouver, WA 98666-5000 <a href="mailto:CntyPA.GeneralDelivery@clark.wa.gov">CntyPA.GeneralDelivery@clark.wa.gov</a>	<input type="checkbox"/> U.S. Mail, Postage Prepaid <input type="checkbox"/> Legal Messenger <input type="checkbox"/> Overnight Mail <input type="checkbox"/> Facsimile <input checked="" type="checkbox"/> Electronic Mail
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## CUSHMAN LAW OFFICES PS

**September 26, 2016 - 4:26 PM**

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